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IN THE

Supreme Court of the United States

October Term, 1963

No. 987

PRADO OIL AND GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK,
UNITED GAS IMPROVEMENT COMPANY,
LONG ISLAND LIGHTING COMPANY
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Petitioner, PRADO OIL AND GAS COMPANY, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled cause on January 23, 1964.[1]

[1] Petitioner Prado Oil and Gas Company filed a petition for review of Opinion Nos. 362 and 362-A, naming the Federal Power Commission as respondent, which was assigned No. 17859 in the Court of Appeals for the District of Columbia. A companion appeal filed by Continental Oil Company et al was assigned No. 17627 by the court. Petitions for review of the same orders of the Commission were filed by United Gas Improvement Company and Long Island Lighting Company in No. 17628 and by the Public Service Commission of the State of New York in No. 17582. Petitioner Prado Oil and Gas Company intervened in No. 17628 and No. 17582. All appeals were consolidated for hearing and a single opinion affirming No. 17627 and No. 17859 and remanding No. 17852 and No. 17628 was issued by the Court of Appeals on January 23, 1964.

CITATION TO OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the District of Columbia Circuit is not yet reported but is printed as Appendix B hereto, *infra*, pp. 18-34.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1964. Jurisdiction of this Court is invoked under 28 USC, § 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission has authority under Section 7(e) of the Natural Gas Act to require producers to refund amounts previously collected pursuant to unconditional temporary certificates.
2. Whether, in certificate proceedings under Section 7 of the Natural Gas Act, the Federal Power Commission may refuse to consider probative cost and financial evidence adduced by producers in support of their initial contract prices.

STATUTES INVOLVED

This case involves primarily § 7(c) and § 7(e) of the Natural Gas Act, 15 U.S.C., § 717f(c) and 717f(e) and Section 157.28 of the Regulations of the Federal Power Commission 18 CFR § 157.28. Those sections of the Act and Regulations are set out in Appendix A, *infra*, pp. 15-17.

STATEMENT

Pursuant to Section 7(c) of the Natural Gas Act and the regulations promulgated thereunder,[2] the Federal Power Commission issued *temporary* certificates to Peti-

[2] Section 157.28 of the Regulations of the Federal Power Commission, which is set forth in Appendix A, *infra*, pp. 16-17.

tioner on August 17, 1960 to make sales of natural gas from fields in South Texas for ultimate consumption in the northeastern United States (R. 64).[3] The Commission did not exercise its authority under Section 7(e) of the Act to condition these temporary certificates on a reduction in the 16¢ per Mcf initial contract price. Nor did the Commission attach a refund condition as was its established practice in cases where there was a substantial question of whether the price authorized under the temporary certificate was consistent with the public interest.

Before Petitioner commenced deliveries of gas, the Commission for the first time enunciated "policies which must be followed in order to regulate the rates of independent producers of natural gas in a sane, sensible and effective manner."[4] The Commission initiated area pricing by its *Statement of General Policy No. 61-1*, issued September 28, 1960,[5] and established an 18¢ per Mcf area price for initial sales from Texas Railroad Commission District No. 4 — the area from which Petitioner's sales are made. In reliance on such area price and the unconditional temporary certificates issued by the Commission,[6] Petitioner had little hesitancy in commencing deliveries at the 16¢ per Mcf initial price set forth in its contracts on file with the Commission as rate schedules.[7]

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[3] Record citations are to the pages of the Joint Appendix used in the Court of Appeals, copies of which are concurrently filed with this petition.

[4] Phillips Petroleum Company, 24 F.P.C. 537, 542 (1960), *aff'd sub nom. Wisconsin* v. *F.P.C.*, 373 U.S. 294 (1963).

[5] 24 F.P.C. 818, 18 CFR 2.56, 25 Fed. Reg. 9578.

[6] The validity of these temporary certificates without price or refund conditions was never challenged or appealed.

[7] Section 157.28(c)(2) of the Commission's Regulations (Appendix A, *infra*, p. 17) required Petitioner to file its contracts "as the rate schedule intended to be effective" for the sale of gas under the temporary certificates.

Petitioner's applications for *permanent* certificates were subsequently consolidated for hearing with similar applications filed by other producers making interstate sales of natural gas from fields in the area. Hearings were held before a Presiding Examiner of the Commission, who issued a decision on January 25, 1962 (R. 539-574). The Examiner granted unconditional permanent certificates of public convenience and necessity to Petitioner and the other producers and approved their initial contract prices. Various parties appealed the Examiner's decision to the Commission.

In the orders under review,[8] the Commission issued *permanent* certificates of public convenience and necessity to Petitioner conditioned upon a reduction in its 16¢ initial contract price to 15¢ per Mcf.[9] The Commission's price condition was based solely upon selected prices being paid to other producers in the area (R. 604-610). The Commission expressly declined to consider the cost and other financial evidence offered by Petitioner and other producers in support of their initial contract prices (R. 610).

The Commission did not, however, condition the permanent certificates to require Petitioner and the other producers to refund amounts previously collected in excess of 15¢ per Mcf for deliveries of gas pursuant to their unconditional temporary certificates and filed rate schedules (R. 614).

Petitioner and other producers sought review in the Court below of the price condition imposed by the Commission. Various intervenors appealed the failure of the Commission to condition the permanent certificates to re-

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[8] Opinion No. 362 issued August 30, 1962 (R. 594-639) and Opinion No. 362-A issued December 18, 1962 (R. 708-721).

[9] The Commission simultaneously issued the Fifth Amendment to its *Statement of General Policy No. 61-1*, 27 Fed. Reg. 8918, reducing the area price for initial sales in Texas Railroad Commission District No. 4 from 18¢ to 16¢ per Mcf.

quire refunds of amounts previously collected in excess of the 15¢ per Mcf price condition.

The Court of Appeals held that under this Court's decision in the *CATCO* case[10] the Commission was justified in conditioning the permanent certificates on a 15¢ price predicated solely on certain prices being paid in the area and in disregarding the cost and financial evidence of record. The court further held that the Commission has the statutory power under Section 7(e) of the Natural Gas Act to condition the permanent certificates to require the producers to refund all amounts previously collected under their effective filed rate schedules and unconditional temporary certificates in excess of the 15¢ price condition imposed. Since the court held that this power to require refunds is not mandatory, it remanded the case to the Commission to reconsider the question of refunds in light of the equities involved.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the decision of the Tenth Circuit in *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F. 2d 404 (Appendix C, *infra*, pp. 35-44). This conflict was recognized by Judge Fahy when he stated (Appendix B, *infra*, p. 32):

> "The producers rely upon the Tenth Circuit's decision in *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F. 2d 404 (1959). The Court there held that even in attaching a refund condition to a temporary certificate the Commission must limit it by setting a price at or below which the producer can sell without risk of a subsequent refund order. The Court felt that without such a limit on the refund obligation the Commission's grant of temporary authority was too vague to allow the producer to decide intelligently whether to accept the

[10] *Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378 (1959).

Commission's conditional grant and thereby commit its gas reserves to interstate commerce.

"*To the extent that our decision may be inconsistent with Sunray, we are constrained respectfully to disagree with the latter.* Moreover, it should also be pointed out that as a practical matter the producers in this case were relatively assured of being able to sell their gas without risk of subsequent refund at a price of 14.6 cents per Mcf., the price which PSC and the other consumer interests originally urged as the proper in-line price." (Emphasis supplied.)

In *Sunray*, the court was confronted with a temporary certificate which contained an express refund condition obligating the producer to refund the difference between the initial contract price and whatever price the Commission ultimately found to be required by the public convenience and necessity when permanent certificates were issued. In holding that such an express refund condition was unlawful because it did not apprise the producer of the terms and conditions applicable to the sales under its temporary certificate, the Tenth Circuit stated (Appendix C, *infra*, pp. 42-44):

"The Act contemplates that the Commission need not accept the conditions contained in an application, Sunray Mid-Continent Oil Co. v. FPC, supra; it likewise contemplates that the applicant need not accept conditions imposed by the Commission in its initial acceptance. Where conditions are imposed by the Commission the applicant has the free choice to accept or reject; to dedicate his property to public service or to refuse so to do; to submit to the jurisdiction of the Commission or to remain beyond the bounds of interstate commerce. This choice cannot be exercised by the applicant if the Commission says, in effect: 'Sell your gas; collect your proposed initial price; we will later tell you if you can keep your collections; if we decide you cannot, you must assure refund by bond.'

* * *

> "But in Atlantic, the applicant was tendered a certificate setting a firm initial rate with a condition allowing potential increase. In the instant case no initial rate is accepted. None is rejected. The applicant is merely asked to speculate as to what the ultimate temporary rate may be, to rely on the ultimate fairness of the final determination, and to meanwhile dedicate its gas to public service. The action of the Commission is neither an acceptance, rejection nor proper conditional acceptance of Sunray's application. It merely purports to hold in abeyance potential conditions. Under such circumstances Sunray is denied its right to have the Commission act upon its application with such certainty as to allow the exercise of choice upon Sunray's part."

In the present case, the temporary certificates did not contain a refund condition. Thus, the vice condemned in *Sunray* was compounded. The Tenth Circuit held illegal an express refund condition which required the producer to speculate as to what the ultimate rate might be for sales under its temporary certificate. Here Petitioner was not even given notice of an indefinite refund obligation. Certainly the "boiler plate" language in Petitioner's temporary certificates referred to by the court below (Appendix B, *infra*, pp. 31-32) did not provide Petitioner with notice of its refund obligation. Identical language is contained in every temporary certificate[11] and has never been construed by the Commission as constituting a refund condition. Nor does the fact that certain intervenors urged a 14.6c per Mcf price in other proceedings[12] cure this lack of notice. (Appendix B, *infra*, p. 32). Under the Natural Gas Act the Federal Power Commission is charged with the responsibil-

[11] The temporary certificate found to be unlawful in the *Sunray* case contained such language.

[12] This assertion was not made in the case of Petitioner's certificate applications until hearings were held on such applications. At that time Petitioner had been delivering gas for over six months.

ity of regulating interstate sales by producers, and what certain intervenors argue in other proceedings could not assure Petitioner of a 14.6c price floor. The only official action on which Petitioner could rely was the 18c per Mcf area price established by the Commission.

2. The conflict between *Sunray* and the decision of the court below is readily apparent. Resolution of this conflict is of importance in the administration of the Natural Gas Act. The Commission has issued literally thousands of temporary certificates without refund conditions. Prior to the decision of the court below, producers assumed that, absent an express refund condition, they were entitled to retain all amounts collected pursuant to unconditional temporary certificates and filed rate schedules.[13] Accordingly, they have paid Federal income taxes, royalties, state production taxes and made other expenditures on the basis of their initial contract prices.

The Tenth Circuit's *Sunray* decision provided additional assurance to these producers that the Commission could not grant unconditional temporary certificates authorizing the collection of initial contract prices and then subsequently tell them what portion of such initial price they were entitled to keep.

Now, these producers are told by the court below that they may have to refund some undetermined part of the initial price being collected pursuant to unconditional temporary certificates. The operating problems due to

[13] Producers acted in reliance upon the established principle of utility law that once payments are made pursuant to an effective filed rate schedule, the recipient cannot be required without prior notice to retroactively refund any part of the payments received. *T.I.M.E.* v. *United States*, 359 U.S. 464 (1959); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

the uncertainty created by this decision are readily apparent. For example, producers selling gas pursuant to unconditional temporary authorization pay state production taxes, royalties and Federal income taxes and make other expenditures on the basis of the initial price authorized in such certificates. How will they recoup amounts they are subsequently required to refund?[14] Since there is no basis for a producer to know how much of his initial price may be subject to refund,[15] he cannot protect himself by withholding payment of royalties, taxes, etc., on a part of his initial price. From an accounting standpoint, what contingent liability is a producer to show on his balance sheet for amounts heretofore collected pursuant to unconditional temporary authorization?[16]

It is clear that the actual practical effect of the decision below will disrupt operations in the natural gas producing industry. The economic detriment to the small producer, such as Petitioner, will be particularly acute. He simply cannot assume the risk of irrevocably committing his gas to interstate commerce[17] without knowing what part of his price he will be allowed to retain. In many cases, the sales authorized under his temporary certificate may constitute a substantial part of his total income. This is no academic matter, for sales under temporary certificates often continue for several years. See *FPC* v. *Hunt*, ... U.S. ..... (No. 273, decided March 30, 1964). Thus, a small producer

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[14] The problem is crucial with respect to state production taxes since as a general rule taxes paid to the state will not be refunded unless paid under protest.

[15] This is particularly true where, as in the present case, Petitioner's 16¢ per Mcf initial contract price was actually 2¢ per Mcf *below* the Commission's 18¢ per Mcf area price for new gas sales.

[16] For publicly held companies this is important since the investing public must be able to rely upon their financial statements.

[17] The temporary certificates issued in this case contained the standard provision that once service was commenced it could not be discontinued without permission of the Commission issued pursuant to provisions of the Natural Gas Act.

may be required to curtail his operations until such time as he definitively knows whether he will be required to refund any part of the amounts previously collected pursuant to an unconditional certificate. His ability to borrow may be severely impaired. In summary, economic considerations may preclude the small producer from utilizing the Commission's temporary authorization procedure. This will put him at a competitive disadvantage. Indeed, all producers may be reluctant to irrevocably commit their gas to interstate markets on the basis of temporary certificates if they do not know what portion of the collections they will ultimately be allowed to retain.

3. The decision of the court below affirming the Commission's refusal to consider cost or financial evidence in a Section 7 certificate proceeding is contrary to the decision of this Court in the *CATCO* case.[18]

In the orders under review, the Commission, for the first time, delineated the evidentiary criteria it would consider in deciding the initial price question in producer certificate cases. The Commission stated that "the principal criterion" was whether the proposed price was "in line" with other certificated sales in the area at the time of contract execution, citing this Court's *CATCO* decision. The Commission expressly refused to consider the cost and financial evidence of record. The Commission went even further and gave notice to the natural gas producing industry that it did not consider cost or financial evidence appropriate in a producer certificate case, stating:

> "However, we do not think it necessary or appropriate in a certificate proceeding to consider evidence of area costs or financial requirements, or of individual company costs or financial requirements. Any such

[18] *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378 (1959).

approach is of limited utility and leads to complicated, long-drawn-out proceedings, detrimental to the public."

In subsequent cases,[19] the Commission has consistently excluded the cost and financial evidence offered by producers in support of their initial contract prices. In each of these cases the Commission has relied upon the blanket condemnation of cost and financial evidence contained in the orders under review as justification for its evidentiary exclusion. Judicial review of the Commission's ruling in certain of these cases is now pending in the courts below.[20]

The Court of Appeals affirmed the Commission's express refusal to consider the cost and financial evidence of record, citing this Court's *CATCO* decision (Appendix B, *infra*, pp. 25-26). It is somewhat anomalous that the court below should cite *CATCO*, for in that case Justice Clark pointedly wondered why the producer applicants had not presented evidence of "relative production costs" for other areas. (360 U.S. at 392-393.)

If the Court of Appeals is correct in its interpretation of *CATCO*, then "the wheel has come full circle."[21] In *CATCO* and its progeny,[22] the courts refused unconditional

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[19] *Amerada Petroleum Corp. et al*, Opinion No. 422, issued March 23, 1964, ... FPC .....; *Texaco Seaboard Inc., et al*, Opinion No. 383, issued March 27, 1963, 29 FPC 593; *Placid Oil Co., et al*, Opinion No. 398, issued July 17, 1963, 30 FPC .....; *United Gas Pipe Line Co., et al*, Opinion No. 399, issued July 17, 1963, 30 FPC .....

[20] See *Ocean Drilling & Exploration Company* v. *FPC*, No. 20989, and related cases in the Fifth Circuit Court of Appeals.

[21] *King Lear*, Act V, Scene 3, Shakespeare.

[22] *United Gas Improvement Co.* v. *FPC*, 290 F. 2d 133 (5th Cir.), *cert. denied* 368 U.S. 823 (1961); *United Gas Improvement Co.* v. *FPC*, 287 F. 2d 159 (10th Cir. 1961); *Public Serv. Comm'n.* v. *FPC*, 287 F. 2d 146 (D. C. Cir. 1960), *cert. denied* 365 U.S. 880 (1961); *United Gas Improvement Co.* v. *FPC*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied* 365 U. S. 879 (1961).

certification of sales of natural gas from fields in South Louisiana because the producer applicants did not offer sufficient evidence to support the proposed initial prices. These decisions held that the Commission's reliance on other certificated sales in the area without supporting evidence was not sufficient to support unconditional certification of the proposed initial prices. In this case, the Commission stated that the only evidence to be considered in a certificate case is that of other certificated sales in the area and that supporting cost or financial evidence will be disregarded.

The need for clarification of the evidentiary standards to be applied in producer certificate cases under Section 7 of the Natural Gas Act is readily apparent. If the Commission's sole function is to look only at other certificated prices in the area and determine the so-called "in-line" price, then let this Court so state. However, if producers are entitled to support their initial contract prices by additional evidence of costs and financial requirements, then let the Court reverse the Commission's universal disregard of all evidence except that related to the determination of the "in-line" price.

The question of what evidentiary standards are to be utilized in Section 7 certificate cases is of vital importance in the administration of the Natural Gas Act. The appropriate evidentiary standards should — in fact, must — be clarified by this Court as soon as possible.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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